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No. 98-7809

IN THE

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

vs.

COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Attorney of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTION PRESENTED

Does the right of self-representation under *Faretta* v. *California* extend to the first appeal as of right?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the potential expansion of the right to self-representation to the first appeal. The waste, delay,

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

confusion, and potential for manipulation that would be caused by recognizing a right to represent oneself on appeal are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant was convicted by a jury of fraudulent appropriation of the property of another. See Brief for Petitioner 2. He represented himself throughout his trial. *Ibid.* The jury also found that he had three prior convictions within the meaning of California's "three strikes" law, Cal. Penal Code §§ 667(d), 667(e)(2), 1170.12(b), and 1170.12(c)(2). Brief in Opposition 1. The defendant was sentenced to 25-years-to-life in state prison. *Ibid.*

A notice of appeal was filed on September 3, 1998. His request to proceed *pro se* was denied by the Court of Appeal on October 16, 1998, under the authority of *In re Walker*, 56 Cal. App. 3d 225, 228-229, 128 Cal. Rptr. 291, 293 (1976). Brief for Petitioner 2. Defendant filed a petition for writ of mandate with the California Supreme Court which was denied on November 18, 1998. App. to Pet. for Cert. This Court granted certiorari on April 19, 1999.

SUMMARY OF ARGUMENT

Faretta v. California does not control the present case. As defendant concedes, *Faretta*'s Sixth Amendment right can do no more than inform the analysis of the present case as the right to appellate counsel is derived from the Fourteenth Amendment's equal protection and due process guarantees.

Faretta is inseparable from the Sixth Amendment's fair trial guarantees. This self-admittedly close decision invoked history, current practice, and the structure of the Sixth Amendment. Although the persuasive historical and modern support for *pro se* representation was important, self-representation's absence

from the Sixth Amendment had to be explained. This could only be done by examining the structure of the Sixth Amendment, which grants a defendant the right to stand alone at trial.

Faretta's Sixth Amendment rule cannot be transplanted to the right to counsel on appeal. The right to self-representation on appeal cannot be inferred mechanically from defendant's appellate rights. If it exists, this right must be supported by precedent, history, and the structure of the right to appellate counsel.

Extending *Faretta* to appeal fails on all three counts. The closest precedents are hostile to extending trial rights to the appeal, and a substantial body of authority rejects the right to self-representation on appeal.

The historical case for self-representation is much weaker for the appeal than the trial. There was no right to appeal convictions at common law, and Congress did not allow criminal appeals in federal criminal cases for over 100 years. The little historical evidence that does exist is hostile to self-representation on appeal.

Neither due process nor equal protection support extending *Faretta* to appeals. Since the vast majority of *pro se* appellants will be injured by their choice, it is difficult to see how due process protects a right to legal self-destruction. The fact that a defendant's choice is limited by the California rule does not violate due process, because the state can prevent a defendant from waiving constitutional rights. It can do so here, where it could not in *Faretta*, because of the fundamental difference between trial and appeal under due process.

An equal protection attack on the California rule fails because the rule does not disadvantage defendant. The *Griffin-Douglas* line of cases seeks to ensure defendants have adequate access to the courts for making the first appeal. Since counsel will almost always provide better access to the courts than self-representation, the California approach is consistent with equal protection.

Faretta should not be extended by even a fraction of an inch. *Faretta*'s value as precedent is on thin ice. Its ambiguous standard is difficult to administer, giving manipulative defendants opportunities to create reversible error. *Faretta* wastes time and resources; it is too often invoked by those least capable of representing themselves, turning trials into demeaning farces.

These problems would be exacerbated on appeal. Defendants are even less capable of representing themselves on appeal than at trial. Extending *Faretta* to appeals will likely include a right to appear for oral argument, creating new risks for the appellate courts. There must be compelling justification to extend *Faretta*'s difficult standard, and none exists here.

ARGUMENT

I. *Faretta* is inseparable from the Sixth Amendment's fair trial guarantees.

Faretta v. *California*, 422 U. S. 806 (1975) does not govern the present case. As defendant effectively concedes, *Faretta*'s Sixth Amendment right to self-representation can do no more than inform the analysis in the present case.[2] The Sixth Amendment does not govern the right to appellate counsel; that right is derived from due process and equal protection. See

2. "*Faretta*'s rationale is significant for the instant case, not because the right to self-representation which the Court located in the Sixth Amendment applies to direct appeals of right *through* that Amendment . . . ." Brief for Petitioner 25 (emphasis in original). The concession is well taken. The Sixth Amendment right to counsel must be viewed in the context of the Sixth Amendment. As all other Sixth Amendment rights—jury trial, confrontation, speedy and public trial, knowledge of the charges and compulsory process, see U. S. Const., Amdt. 6—are only relevant to the trial, the Sixth Amendment right to counsel is similarly limited to the trial. See Pritchard, Auctioning Justice: Legal and Market Mechanisms of Allocating Criminal Appellate Counsel, 34 Am. Crim. L. Rev. 1161, 1182 (1997).

Ross v. *Moffitt*, 417 U. S. 600, 608-609 (1974). Since *Faretta* is so closely tied to the Sixth Amendment's fair trial guarantees, it is unlikely to thrive in the different soil of the equal protection/due process rationale of the right to appellate counsel.

As *Faretta* itself recognized, even at trial the constitutional question was a close one. 422 U. S., at 807. If "a lawyer who represents himself has a fool for a client," *Kay* v. *Ehrler*, 499 U. S. 432, 438 (1991), then the self-represented lay defendant is in a far worse situation. This Court has consistently recognized that the unrepresented lay defendant is at a great disadvantage at trial. See, *e.g.*, *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932); *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963); *Evitts* v. *Lucey*, 469 U. S. 387, 394 (1985). The decision to "bestow[] a *constitutional* right on one to make a fool of himself," *Faretta*, 422 U. S., at 852 (emphasis added) (Blackmun, J., dissenting), required extensive justification. See generally Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L. J. 483 (1996).

Inferring self-representation from the Sixth Amendment right to counsel was only possible after a broad and detailed analysis. *Faretta* began its analysis by noting the long federal tradition of self-representation, starting with section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, now codified at 28 U. S. C. § 1654, which was enacted by the same Congress that proposed the Sixth Amendment. *Faretta*, *supra*, 422 U. S., at 812-813. This practice was adopted by the overwhelming majority of the states. *Id.*, at 813-814, and nn. 9, 10.

Faretta also found support in decisions giving a defendant control of his defense. In *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942), the defendant was allowed to plead guilty to a felony without first having the approval of counsel, referring to a right to dispense with counsel as "correlative" to the right to assistance of counsel. See *Faretta*, *supra*, 422 U. S., at 814-815. Similar support was found in the

defendant's right to be present at trial, as his presence gave him the power " 'to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself.' " *Id.*, at 816 (emphasis omitted) (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 106 (1934)). These precedents were supplemented by pervasive federal circuit court authority supporting the right to self-representation at trial. See *id.*, at 816-817. The *Faretta* Court thus found a "nearly universal conviction, on the part of our people as well as our courts," that the defendant was entitled to represent himself at trial, *id.*, at 817, which was "a consensus not easily ignored." *Ibid.*

History also played a role in the *Faretta* decision. The Court noted that self-representation predated the right to counsel at trial under the common law, and in fact was mandatory for serious crimes. See *id.*, at 823. The colonies were initially even more insistent upon self-representation than England. *Id.*, at 826. As the right to counsel developed on both sides of the Atlantic, self-representation was retained as an option. See *id.*, at 825-828.

In addition to history and precedent, the *Faretta* Court was necessarily concerned with fidelity to the text of the Sixth Amendment. Although the Sixth Amendment and the Judiciary Act of 1789 that recognized self-representation were passed by the same Congress, see *id.*, at 812-813, the Sixth Amendment explicitly recognized only the right to counsel. This raised the potential inference that the framers did not deem self-representation fundamental, and chose to exclude it from the Constitution. See *id.*, at 844 (Burger, C.J., dissenting). While this Court occasionally infers constitutional rights from general language, particularly under due process, see *id.*, at 819, n. 15 (majority opinion), this "is not, of course, a mechanistic exercise." *Ibid.* Because " '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right,' " *ibid.* (quoting *Singer* v. *United States*, 380 U. S. 24, 34-35 (1965)), *Faretta*'s difficult

question, see *id.*, at 807, was made even more so by its absence from the text of the Sixth Amendment.

The *Faretta* majority's answer to the textual problem was based on the structure of the Sixth Amendment's trial rights. The control and responsibility for one's own defense that the Sixth Amendment grants to defendant provided the textual foundation for the right to self-representation. Confrontation, compulsory process, and information on the nature of the charges are personal rights of the defendant under the Sixth Amendment. "The Sixth Amendment does not provide merely that a defense shall be made for an accused; it grants the accused *personally* to make the right to his defense." *Id.*, at 819 (emphasis added). These personal rights are derived from what is at stake in the trial. "The right to defend is given directly to the accused; for it is he who suffers the consequence if the defense fails." *Id.*, at 819-820. This allows a defendant to take the ultimate personal responsibility for his defense. *Faretta* preserves defendant's "moral right to stand alone in his hour of trial." *United States* v. *Dougherty*, 473 F. 2d 1113, 1128 (CADC 1972); Damaska, Structures of Authority and Comparative Criminal Procedure, 84 Yale L. J. 480, 537 (1975).

This is the key to *Faretta*'s analysis. The other justifications for the *Faretta* rule, although important, were not decisive in a case this close. While there is a historical tradition of self-representation at trial, the historical support for a right to represent oneself is not compelling in light of its absence from the Sixth Amendment. Tradition alone does not erect a constitutional barrier against a state's decision to depart from tradition. See, *e.g.*, *Hurtado* v. *California*, 110 U. S. 516, 528-529 (1884). Self-representation's prevalence was also an insufficient explanation for the *Faretta* right. Widespread acceptance of a practice, like tradition, does not automatically transform it into a constitutional right. See, *e.g.*, *Martin* v. *Ohio*, 480 U. S. 228, 236 (1987); *Patterson* v. *New York*, 432 U. S. 197, 211 (1977); cf. *California* v. *Green*, 399 U. S. 149, 184-185 (1970) (Harlan J., concurring) (Confrontation Clause

should not impose a uniform rule of hearsay, which would eliminate state experimentation). Therefore, the constitutional basis for the right to self-representation had to be in "the structure of the Sixth Amendment . . . ." *Faretta*, *supra*, 422 U. S., at 818.

Faretta's structural interpretation of the Sixth Amendment turns on the importance of the trial to the defendant. This Court's habeas cases have distinguished the trial, as the " 'main event' " at which a defendant's rights are to be determined, from the necessarily collateral habeas proceedings. *McFarland* v. *Scott*, 512 U. S. 849, 859 (1994) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)); see also *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977) (distinguishing trial "as a decisive and portentous event"). The appeal, like habeas, is also less critical than trial, once again under "the principle that a trial on the merits, whether in a civil or criminal case, is the 'main event' and not simply a 'try out on the road' to appellate review." *Freytag* v. *Commissioner*, 501 U. S. 868, 895 (1991) (Scalia, J., concurring) (quoting *Sykes*, *supra*).

The criminal trial is the "main event" because the defendant has so much at stake. It is where the State tries "to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974). Thus, "while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all." *Id.*, at 611; see *McKane* v. *Durston*, 153 U. S. 684, 687 (1894).

Because the defendant has everything to lose at trial, he or she has the right of self-representation. Under the Sixth Amendment's guarantee of the trial as the central proceeding, a defendant who chooses to take ultimate responsibility for his or her defense, must be allowed to do so. Cf. *McCaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984) (defendant cannot complain about the quality of his self-representation). Any other result "and the right to make a defense is stripped of the

personal character upon which the Amendment insists." *Faretta*, *supra*, 422 U. S., at 820. The special protection and responsibility given to the defendant by the Sixth Amendment due to the singular importance of the trial is the heart of the *Faretta* ruling, which cannot be transplanted to the appeal.

II. *Faretta*'s Sixth Amendment rule cannot be transplanted to the right to counsel on appeal.

Although defendant concedes that *Faretta* does not control the present case, see *supra*, at n. 2, he attempts a wholesale transfer of *Faretta*'s reasoning to the first appeal by equating the first appeal with the trial. See Brief for Petitioner 25. This overstates the importance of the first appeal. In coming to this conclusion, defendant makes an analytical error that the *Faretta* Court warned against—mechanically inferring one right from another. See *Faretta* v. *California*, 422 U. S. 806, 820, n. 15 (1975). The right to insist upon the opposite of an enumerated constitutional right is the exception rather than the rule. *Id.*, at 819, n. 15; see *supra*, at 6. The *Faretta* Court examined precedent, history, and the structure of the relevant constitutional text before inferring the right to self-representation. See *supra*, at 5-8. Applying a similar analysis to the present case shows that the *Faretta* rationale does not apply to the first appeal. *Faretta* stands on three legs, none of which supports its extension to appeals.

A. Precedent.

Precedent does not support extending the right to self-representation to the first appeal. The closest precedents to the present case disfavor the right to self-representation on appeal. In *Price* v. *Johnston*, 334 U. S. 266 (1948), overruled on other grounds in *McCleskey* v. *Zant*, 499 U. S. 467, 483 (1991), a federal prisoner in Alcatraz, who was representing himself on his fourth habeas petition, sought to appear before the Ninth Circuit en banc in order to reargue his appeal. See *id.*, at 276.

The Ninth Circuit held that the circuit courts did not have the power to order the prisoner's presence for oral argument. *Ibid.*

This Court reversed, finding that the courts of appeals had the discretionary authority under the All Writs Act to require a defendant's presence to argue his or her appeal. *Id.*, at 278. The discretionary nature of this power demonstrates that *pro se* representation on appeal is a matter of grace and not of right.

> "The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. [Citation.] The absence of that right is in *sharp contrast* to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, [footnote and citation] and to his *recognized privilege of conducting his own defense at the trial.* Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.*, at 285 (emphasis added).

The importance of this passage to the present case is reinforced by *Faretta*, which quotes the words italicized above and favorably cites the passage for the purpose of distinguishing the trial from post-trial proceedings. See *Faretta*, *supra*, 422 U. S., at 816.

Although *Price* does not directly control the present case, it does provide an important counterpoint to *Faretta*. As in the present case, the *Faretta* Court found that there was no controlling authority on the right to self-representation. *Faretta* did, however, find statements from this Court's decisions strongly supportive of a trial right to self-representation. See 422 U. S., at 814-815; *supra*, at 5-6. *Price* provides similar support for the opposite result in the present case, with added value of approval from *Faretta*.

Price, in turn, finds support in *Schwab* v. *Berggren*, 143 U. S. 442 (1892). Schwab asserted that the common law right

to be present and speak on his behalf when the trial court pronounces a death sentence, see *id.*, at 446-447; see 4 W. Blackstone, Commentaries 368 (1st ed. 1769), applied to an appellate court issuing an order affirming his death sentence. 143 U. S., at 446. This Court rejected the claim, holding that due process does not require defendant's presence before the appellate court, particularly when he has counsel. *Id.*, at 449. More importantly, *Schwab* noted the general distinction between defendant's trial and appellate rights:

> "This objection is founded upon an erroneous idea of a criminal trial, and of the power and duty of this court in such a case brought before it by appeal. The Constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court as heretofore used. *That* is his *trial*. This of course, implies that he shall have a right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this court. *Here*, are no 'accusers,' no 'witnesses,' and no 'jury;' but upon inspection of the record this court decides whether there was error in the trial, and without rendering any judgment, orders its decision to be certified to the court below. It has never been understood, nor has it been the practice that the defendant shall be present in *this* court; nor is he ever 'convicted' here." *Id.*, at 450 (quoting *State* v. *Overton*, 77 N. C. 485, 486 (1877)) (emphasis in original).

The *Schwab* Court found this "not only consistent with 'due process of law'—giving those words their most liberal interpretation—but is founded on a wise public policy." *Id.*, at 451.

The *Faretta* Court also relied on the very strong majority rule in both the state and the federal systems granting the right to self-representation at trial. See *supra*, at 5. There is no similar consensus for extending *Faretta* to the first appeal. The

states and the federal circuits are split over this issue. Compare *United States* v. *Gillis*, 773 F. 2d 549, 560 (CA4 1985); *Lumbert* v. *Finley*, 735 F. 2d 239, 245-246 (CA7 1984); *Blandino* v. *State*, 914 P. 2d 624, 626 (Nev. 1996); *Hill* v. *State*, 656 So. 2d 1271, 1272 (Fla. 1995) (no right to self-representation on appeal), with *Chamberlin* v. *Erickson*, 744 F. 2d 628, 630 (CA8 1984) (right to file *pro se* brief but not participate in oral argument); *United States* v. *Grimes*, 426 F. 2d 706, 707 (CA5 1970) (recognizing right but not addressing whether it is constitutionally based); *United States* v. *Wagner*, 158 F. 3d 901, 902 (CA5 1998) (constitutional and statutory right); *United States* v. *O'Clair*, 451 F. 2d 485, 486 (CA1 1972) (stating defendant may conduct his own appeal "[i]f he feels qualified"; no constitutional basis stated); *Gidron* v. *State*, 850 S. W. 2d 331, 332-333 (Ark. 1993) (by state rule of court); *Hathorn* v. *State*, 848 S. W. 2d 101, 123 (Tex. Crim. App. 1992) (right to *pro se* appeal); *State* v. *Warner*, 594 So. 2d 397, 402 (La. App. 1991) (constitutional, but no right to oral argument); *Webb* v. *State*, 412 N. E. 2d 790, 792 (Ind. 1980). See Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L. J. 483, 591-594 (1996); Krikava & Winking, The Right of an Indigent Criminal Defendant to Proceed *Pro Se* on Appeal: By Statute or Constitution, A Necessary Evil, 15 Wm. Mitchell L. Rev. 103, 113-114 (1989). While self-representation may have some numerical edge, it is not close to the near unanimity found in *Faretta*.

In contrast to *Faretta*, the Court in *Singer* v. *United States*, 380 U. S. 24, 36-37 (1965) noted a deep split of authority in the states regarding whether a defendant could reject jury trial and insist on a bench trial. The present case is more like *Singer* than *Faretta*. The path the defendant asks this Court to follow is not Justice Jackson's "beaten path." Cf. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 26 (1945); *Faretta*, *supra*, 422 U. S., at 817. The path to rejecting the right to self-representation on appeal is also well trodden, and, in light of *Price* and *Schwab*, much

clearer. A defendant's desire to represent himself cannot stand on this leg of *Faretta*'s tripod.

B. History.

The historical case for self-representation is much weaker for the appeal than for the trial. At common law, there was no right to appeal in criminal cases. See 1 J. Stephen, A History of the Criminal Law of England 308-309 (1883) ("no appeal properly so called" and "writs of error . . . entirely as a matter of favour" on very limited grounds). Indeed, with a few exceptions, appeals were not permitted from federal convictions for over 100 years, and England followed a similar practice until 1907. *Griffin* v. *Illinois*, 351 U. S. 12, 21 (1956) (Frankfurter, J., concurring in the judgment). The historical case for a right to self-representation on an appeal is significantly undercut by the nonexistence of appellate review in most criminal cases throughout much of our legal history.

The little historical evidence that exists is contrary to the right to self-representation on appeal. When criminal appeals became common in the late nineteenth century, a sharp line was drawn between trial and appeal. Because there was no right to an appeal, the state could condition its gift as it saw fit. "It is wholly within the discretion of the state to allow or not allow such a review . . . . ¶ It is, therefore, clear that the right to appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." *McKane* v. *Durston*, 153 U. S. 684, 687-688 (1894). The limited appellate rights were in sharp contrast with the numerous trial rights. See *Schwab*, *supra*, 143 U. S., at 450.

When the practice of appeals in criminal cases finally developed, the state could have forbidden defendant from proceeding *pro se*. Even if it were allowed, this practice could not have been seen as a fundamental right. Until this Court began the constitutional regulation of criminal appeals in *Griffin*, *supra*, and *Douglas* v. *California*, 372 U. S. 353 (1963), state discretion over appellate procedures was unchal-

lenged. The constitutional limitations of *Douglas* and *Griffin*, while relevant to the structural analysis of the right to appeal, do not affect the historical case. If *Faretta* is to extend to appeals, it must do so under a structural analysis of the due process/equal protection foundation of *Douglas*, *Griffin*, and their progeny.

C. Structure.

The present case demands a more involved structural analysis than was found in *Faretta*. *Faretta*'s trial right was inferred from the Sixth Amendment right to counsel, the sole purpose of which is to protect the right to a fair trial. See *Faretta*, *supra*, 422 U. S., at 818-819; *Wheat* v. *United States*, 486 U. S. 153, 158-159 (1988). The right to appellate counsel, on the other hand, is derived from due process and equal protection principles guaranteeing equal access to the courts. See *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985).[3] Although rights not literally expressed in the Constitution can be inferred from due process, see *Faretta*, 422 U. S., at 819, n. 15, the defendant asks too much in this case. The right to appellate

3. This Court's occasional reference to the Sixth Amendment right of counsel in the context of the appeal, see, *e.g.*, *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), does not change the source of the right to appellate counsel. *Carrier* dealt with errors of counsel in the first appeal as cause for state procedural default on federal habeas corpus. See *id.*, at 481-483. The Court held that so long as defendants did not receive ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668 (1984), they would bear the risk of attorney error. 477 U. S., at 488. It also noted that when procedural default is the result of constitutionally ineffective assistance of counsel, the Sixth Amendment imputes responsibility to the state. *Ibid.* The distinction between the Sixth Amendment and due process did not matter because the defendant in *Carrier* admitted that counsel's error did not fall below the constitutional standard. See *id.*, at 497. Since *Carrier* did not need to examine the source of the right to appellate counsel with care, it does not change the substantial authority supporting equal protection and due process as the sources of this right. See *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821).

counsel is contingent upon the State providing the right to appeal, a benefit it does not have to give. Extending *Faretta* to appeals would add another inference. Rights can be extended or inferred only so far. See, *e.g.*, *Davis* v. *United States*, 512 U. S. 452, 462 (1994) (declining to add a "third layer of prophylaxis" to the privilege against self-incrimination). "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (Jackson, J., concurring and dissenting).

In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), another attempt to extend the appellate rights, the Court analyzed the defendant's request separately under due process and equal protection. See *id.*, at 609-616. A similar analysis will show the weakness of defendant's claim in the present case.

1. Due Process.

The due process component of the appellate rights cases analyzes the fairness between the individual and the state. See *Evitts*, *supra*, 469 U. S., at 405. Courts in these cases are looking for a lack of fundamental fairness before they invoke due process to intervene in appellate procedure. See *Pennsylvania* v. *Finley*, 481 U. S. 551, 556 (1987). This Court does not seek to impose its own view of proper appellate procedure on the states or Congress, but to keep appellate review "free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966). The search for fundamental unfairness must take into account the principles that due process does not give a defendant an entitlement to the most favorable result, see *Medina* v. *California*, 505 U. S. 437, 451 (1992), and that the states are accorded considerable deference when deciding the structure of their appellate systems. See *Johnson* v. *Fankell*, 520 U. S. 911, 922, n. 13 (1997).

Fundamental fairness imposes few rules of criminal procedure outside the enumerated rights set forth in the other provisions of the Bill of Rights.

> "In the field of criminal law, we 'have defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.' *Dowling* v. *United States*, 493 U. S. 342, 352 (1990); accord, *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977). The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967), 'it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.' " *Medina*, *supra*, 505 U. S., at 443-444.

Fundamental fairness does not justify extending *Faretta* to appeals. The vast majority of *pro se* appellants will be injured rather than aided by their choice. As bad as self-representation is at trial, see *supra*, at 5, it is an even worse option for the appellate defendant. At trial, the lawyerless defendant at least has a chance to argue the facts to a jury of fellow laymen and try to convince them of the unjustness of convicting him. See *Faretta*, *supra*, 422 U. S., at 829, n. 37 (describing trial of William Penn). A defendant on appeal does not have this luxury. Appellate courts rarely address purely factual issues, and then under standards tilted heavily toward affirmance. See, *e.g.*, *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979) (" . . . whether, after viewing the evidence in the light more favorable to the prosecution, *any* rational trier of fact could have found . . . " (emphasis in original)). Attack on the conviction or the

law underlying it must generally be made through legal arguments, not fact-based claims or appeals to an amorphous sense of justice.

A defendant who has no counsel on appeal "has only the right to a meaningless ritual . . . ." *Douglas* v. *California*, *supra*, 372 U. S., at 358. When the right to appellate counsel is premised upon fundamental fairness between the individual and the state, see *Ross*, *supra*, 417 U. S., at 609, it makes no sense to invoke these principles to give the defendant such a "right."

Defendant attempts to raise the specter of unfairness by claiming that California's rule unconstitutionally restricts his choice. See Brief for Petitioner 28-29. This argument infers too much and explains too little. Although he is correct that a constitutional right *can* be waived by the defendant, see *ibid.*, it does not automatically follow that there is a *right* to dispense with a constitutional right. See *Singer* v. *United States*, 380 U. S. 24, 34-35 (1965). The state can insist upon a procedure even if it is a constitutional right of the defendant, as there is no general right to waive rights. See, *e.g.*, *id.*, at 35 (public trial, vicinage, and confrontation rights do not imply their opposites); *id.*, at 36 (no right to bench trial implied by trial by jury); see also *Santobello* v. *New York*, 404 U. S. 257, 262 (1971) (no right to plead guilty). Although choice has a value in the constitutional scheme, particularly under the First Amendment, see *Faretta*, *supra*, 422 U. S., at 834, n. 45, it is not a constitutional talisman. Just as the State can affect the decision to exercise a right, see *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993), it can prevent a defendant from waiving certain rights. *Faretta*, tied to the singular importance of the trial, see *supra*, at 5-8, is the exception rather than the rule.

California can restrict a defendant's choice in a way that was not allowed in *Faretta* because of the fundamental difference between trial and appeal. In *Ross*, *supra*, 417 U. S., at 602-603, this Court addressed whether the right to counsel extended to discretionary appeals. Although the discussion does not control this case, *Ross*' due process analysis illustrates

the constitutionally significant difference between the trial and the appeal.

> "By contrast [to the trial], it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the States' prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. *This difference is significant* for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston*, 153 U. S. 684 (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas* v. *California*, *supra*. *Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty.* That question is more profitably considered under an equal protection analysis." *Id.*, at 610-611 (emphasis added in part).

This principle is sound without regard to the stage of the appeal. There is no right to confrontation or jury or even to be present on appeal. See *Schwab* v. *Berggren*, *supra*, 143 U. S., at 450. Special protections available at trial are often not extended to the appeal. While due process protects a defendant at trial through the reasonable doubt standard, see *Victor* v. *Nebraska*, 511 U. S. 1, 22 (1994), this protection disappears on appeal. Now it is up to the defendant, with counsel as a sword, to overturn the finding of guilt. See *Ross*, *supra*, 417 U. S., at 610.

Ross does not distinguish between mandatory and discretionary appeals when compared to trials. While personal autonomy may compel the right to stand alone at trial, see

supra, at 7, the appeal, where the defendant seeks to wield a sword rather than a shield, is different. So long as a rough equality is maintained between the rich and poor, see *Douglas*, *supra*, 372 U. S., at 357 (absolute equality not required), the right to counsel on appeal is satisfied. As in *Ross*, this is better examined under equal protection.

2. Equal Protection.

Rough equality between rich and poor is at the heart of the right to counsel on appeal decisions. *Douglas* recognized a right to appellate counsel because "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas*, *supra*, 372 U. S., at 357 (emphasis in original). Similar principles are found throughout the appellate rights cases. See, *e.g.*, *Ross*, *supra*, 417 U. S., at 611; *Anders* v. *California*, 386 U. S. 738, 745 (1967); *Pennsylvania* v. *Finley*, *supra*, 481 U. S., at 556; *Burns* v. *Ohio*, 360 U. S. 252, 257 (1959); *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956). The Constitution does not demand absolute equality, but instead "that the state appellate system be 'free of unreasoned distinctions,' *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system." *Ross*, 417 U. S., at 612.

An equal protection attack on the California rule must fail because the rule does not disadvantage the indigent defendant. Because self-representation on appeal will almost always be a grave mistake for the indigent defendant, see *supra*, at 5, denying self-representation does not harm a defendant in the context of the right to appellate counsel. The *Griffin-Douglas* line of cases seeks to ensure indigent defendants have adequate access to the courts for the purpose of making the first appeal. See *ibid.* Since counsel will almost always be able to present the appeal better than an unrepresented defendant, see *Evitts* v.

Lucey, *supra*, 469 U. S., at 396,[4] California's rule does not deprive a defendant of his or her access to the courts. When a prisoner has a right to access to the courts, it is the actual access that is important, not the particular means used to achieve this end that matters. See *Lewis* v. *Casey*, 518 U. S. 343, 351 (1996). Because representation by competent counsel is the best way to ensure adequate access to the appellate courts, California should be allowed to limit a defendant to appointed counsel on the first appeal.

The State has a substantial interest in making sure that a defendant's interests are adequately represented on appeal. The state has a higher interest than convicting defendants: seeing that justice is served. Our adversarial system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question. *Penson* v. *Ohio*, 488 U. S. 75, 84 (1988). This is not possible when the defendant is without counsel on appeal. See *ibid.* Allowing counsel to prosecute the appeal will help ensure that the best arguments are emphasized on appeal, allowing the defendant's case to be seen in the best light, while concentrating scarce judicial resources on the truly relevant issues. See *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983). A court that must rely on an unrepresented defendant can expect an onslaught of frivolous issues, prejudicing the meritorious claims by burying them in a flood of worthless ones. Cf. *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the judgment).

The argument has been raised for extending *Faretta* to the first appeal because wealthy appellants would not be prevented from representing themselves, while indigent appellants must proceed with counsel, even if this is against the individual

4. In addition to much greater competence, counsel also gives defendant some protection from mistakes made on the first appeal. While represented defendants may get relief for ineffective assistance of appellate counsel, see *ibid.*, unrepresented defendants must bear the burden of their own mistakes. *McCaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984).

appellant's wishes. See Krikava & Winking, The Right of an Indigent Criminal Defendant to Proceed *Pro Se* on Appeal: By Statute or Constitution, A Necessary Evil, 15 Wm. Mitchell L. Rev. 103, 129 (1989). The disparate treatment based on wealth, this argument runs, would violate the equal protection component of the right to appellate counsel cases. See *id.*, at 131-132.

There is no evidence that California makes this distinction between rich and poor. The defendant has neither shown nor alleged that California would allow a non-indigent defendant to appeal *pro se* instead of hiring counsel. It is likely that courts have not yet confronted this problem. Most defendants in the criminal justice system are indigent at entrance; the number who remain solvent after financing a trial is vanishingly small. Those few with the considerable resources needed to finance their own criminal appeal are unlikely to be foolish enough to represent themselves. "Law addresses itself to actualities." *Griffin*, *supra*, 351 U. S., at 23 (Frankfurter, J., concurring). Until a court actually indulges this hypothetical foolish, wealthy defendant, the problem remains hypothetical, and should not be addressed.

When addressing the equal protection component of the right to appellate counsel "[t]he question is not one of absolutes, but one of degrees." *Ross*, *supra*, 417 U. S., at 612. The Fourteenth Amendment prevents a defendant's indigency from turning the first appeal into a "meaningless ritual" while the better off receive a "meaningful appeal." *Douglas*, *supra*, 372 U. S., at 358. The defendant would invert these principles to force California to turn his appeal into a sham. Because the Court of Appeal protected his access to the courts, its decision did not violate the Constitution.

Of the three reasons given by *Faretta* for its rule—precedent, history, and the structure of the Sixth Amendment—none applies to the appeal. Where the reason for the rule ends, the rule should end. *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). *Faretta* should end at trial.

III. *Faretta* should not be extended by even a fraction of an inch.

A precedent should be reconsidered and possibly overruled when it has "proven to be intolerable simply in defying practical workability . . . ." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854 (1992). On this criterion, *Faretta* v. *California*, 422 U. S. 806 (1975) is on thin ice. Justice Blackmun's misgivings about the litigation-breeding potential of *Faretta*, see *id.*, at 852, have proven all too justified. While unworkability is a reason to reconsider a precedent in an appropriate case, it is an even more powerful reason not to extend a dubious precedent into new territory, "by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

Faretta has been a headache for the courts. Its ambiguous standard is difficult to administer, giving manipulative defendants opportunities to create reversible error. *Faretta* wastes scarce time and resources. The decision is too often invoked by those least capable of representing themselves. These problems would be exacerbated by an appellate process that is structurally incompatible with self-representation.

The problems with self-representation begin with the type of person who follows this route. Since representing oneself is such a bad choice for the defendant, see *supra*, at 5, there is ample reason to suspect the motives of these defendants. Unfortunately, the *Faretta* rule draws many bad motivations.

> "While it is difficult to pinpoint the exact motivation behind a criminal defendant's request to proceed pro se at trial, a number of themes emerge. Some defendants may proceed pro se to symbolize their lack of respect for any kind of authority, such as that of the courts, or because they are unable to get their way and so represent themselves as an act of defiance. Some pro se defendants have committed such heinous atrocities that life imprisonment or the death penalty is the most likely result.[4] Other criminal defendants

> may be cleverly manipulating the criminal justice system for their own secret agenda when they ask to proceed pro se. Trying to proceed pro se may be the means to a radical political scheme that the defendant wants to advance. On the other hand, while some pro se defendants may not harbor a hidden motive behind the request, they are so totally out of touch with reality that they believe they can do it all themselves.

"[4] These defendants may feel they have nothing to lose by representing themselves. [Citing Charles Manson as an example.]" Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L. J. 483, 485-486 (1996) (footnotes omitted in part).

While self-representation may once have attracted such distinguished individuals such as William Penn, see *Faretta*, *supra*, 422 U. S., at 829, n. 37, some of its current practitioners are more notorious. Those who sought to represent themselves have included serial killers such as Ted Bundy and Douglas Clark, the "Sunset Slayer," see *Bundy* v. *Dugger*, 850 F. 2d 1402, 1412 (CA11 1988); *People* v. *Clark*, 3 Cal. 4th 41, 93, 833 P. 2d 561, 584 (1992), mass murderers including Charles Manson and Colin Ferguson, see *People* v. *Manson*, 61 Cal. App. 3d 102, 172, 132 Cal. Rptr. 265, 306 (1976); Decker, *supra*, 6 Seton Hall Const. L. J., at 486-487, nn. 4, 7, and terrorists such as Sheik Omar Abdel-Rahman, the mastermind of the World Trade Center bombing. See Decker, at 487, n. 6.

Unfortunately, *Faretta* allows such people to represent themselves. The standard for competency to waive counsel is the same as the competency to stand for trial. *Godinez* v. *Moran*, 509 U. S. 389, 398 (1993). The standard is not very

high[5] and does not guarantee that a defendant's self-representation will be adequate to his or her needs. "[A] criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Id.*, at 400 (emphasis in original).

Since those who choose self-representation are usually the least up to the task, *Faretta* frequently leads to farcical trials. Thus Colin Ferguson, who killed six people on a Long Island Railroad commuter train, asserted in his opening statement "that there was a 93-count indictment against him only because the crime occurred in 1993." Decker, *supra*, 6 Seton Hall Const. L. J., at 487, n. 7. Psychiatrists testified at his competency hearing to his "belief in a conspiracy, which included 'a scheme to injure his eyes so that he could not identify the person whom he said carried out the shootings' . . . ." *Id.*, at 522. Ferguson fired his counsel for thinking that he was crazy, see *ibid.*, and the trial court found him competent to stand trial. *Id.*, at 523. The resulting defense was a demeaning, well-publicized spectacle. See *ibid.*; Bonnie, Ferguson Spectacle Demeaned System, National L. J., March 13, 1995, p. A23.

Extending *Faretta* to appeals would compound the problem in cases such as this. The best argument on appeal for a defendant like Ferguson would typically be an attack on the trial court's ruling on competency. Yet a defendant like Ferguson will probably not make that argument, and in the process of deciding whether to permit self-representation on appeal the appellate court would have to make its own factual finding on competency. Appellate courts are not suited to this task, and the integrity of the review process would be threatened by permitting marginally competent appellants to forfeit review of the competency determination.

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5. "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and assist in preparing his defense may not be subjected to a trial." *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975).

Faretta has an even darker side, a potential loophole for the particularly manipulative defendant. A chilling example of what *Faretta* can do is found in *Clark*, *supra*. Clark stood trial for the murders of two teenage girls and four women, and the attempted murder of another woman. See *Clark*, *supra*, 3 Cal. 4th, at 70-76, 833 P. 2d, at 570-573. Clark, represented by Maxwell Keith as lead counsel and Penelope Watson as assistant, see *id.*, at 89-90, 833 P. 2d, at 581-582, first expressed a desire to represent himself after a defense discovery motion was partially denied. See *id.*, at 90, 833 P. 2d, at 582. On the day before the trial, he made a *Faretta* motion along with a motion to have Watson assist him. The trial court denied the motion as untimely, not wanting to disrupt an estimated six-month, hundred witness trial. See *id.*, at 90-92, 833 P. 2d, at 582-583. After repeated requests by Clark, the trial court granted his *Faretta* motion on the fifth day of trial, after carefully informing defendant of his rights. See *id.*, at 93, 833 P. 2d, at 584.

Clark then stated "that he did not want to be his own attorney but was 'forced' to because 'It's my life and to proceed with Mr. Keith as my attorney . . . is suicide.' " *Ibid.* Clark then started to make personal attacks against Keith, which the trial court dismissed as " 'so outrageous they don't warrant an answer from the court.' " *Ibid.* The trial court ordered Keith and Watson to remain as standby counsel. One week later, after the trial court did not grant all of his requests, Clark stated he had resigned his *pro per* status, as the court would not let him prepare the case as he wished. *Id.*, at 94, 833 P. 2d, at 585. When asked whether he was giving up his right to represent himself, Clark "stated 'emphatically' that he wanted to retain his *pro per* status" but that he wanted the court to grant his various requests. *Ibid.* When he did not get his way in further rulings, Clark "declared that the defense 'stands mute for the rest of the trial.' " *Ibid.* The trial court found that Clark had waived his *Faretta* rights, and reappointed Keith and Watson. *Id.*, at 94-95, 833 P. 2d, at 585. Later that afternoon, as Keith began cross-examining a witness, Clark told the jury that Keith

did not represent him. *Id.*, at 95, 833 P. 2d, at 585. Keith continued the defense for the rest of the day.

The next day Clark asked to have his *pro per* privileges reinstated. The trial court assented, keeping Keith and Watson as standby. *Ibid.* At the close of the People's case, defendant moved to dismiss all counts because the court had interfered with his *pro per* rights after he stood mute. The trial court denied the motion, warning Clark that any more misconduct would lead to counsel being reappointed. *Ibid.* Clark continued to fight the court over his motions, leading the court to withdraw *pro per* privileges permanently on December 8, 1982, after defendant became abusive. *Id.*, at 96, 833 P. 2d, at 586.

Although the California Supreme Court found no *Faretta* error, see *id.*, at 96-97, 833 P. 2d, at 586, Clark did convince one Justice to find *Faretta* error for appointing counsel after defendant chose to stand mute. See *id.*, at 175, 833 P. 2d, at 639 (Kennard, J., dissenting). Justice Mosk found the opposite "error," believing that capital defendants should be denied self-representation whenever they lack the "knowledge and abilities . . . to effectively duel with the skilled prosecutor," *id.*, at 174, 833 P. 2d, at 638, which could be nearly always.

The *Clark* case is rendered even darker by the fact that Clark may have intended to use his *Faretta* rights to *create* error. In a letter to another inmate, Clark "boasted that he had 'gone "Pro per" at least 3 times' and had the case so fraught with controversial Judge's rulings it will be an appeals court NIGHTMARE, should it ever get so far.' " *Id.*, at 88, n. 3, 833 P. 2d, at 581, n. 3 (emphasis added).

Unfortunately, there is some possibility that he succeeded. A requirement to honor a defendant's decision to stand mute has been cited in dicta by several federal courts. See *United States* v. *McDowell*, 814 F. 2d 245, 250 (CA6 1987); *United States* v. *Clark*, 943 F. 2d 775, 782 (CA7 1991); *Savage* v. *Estelle*, 924 F. 2d 1459, 1464, n. 10 (CA9 1990). *Faretta* only mentions terminating the self-representation rights of a defendant "who deliberately engages in serious and obstructionist misconduct." *Faretta*, *supra*, 422 U. S., at 834, n. 46. It is difficult to characterize silence as obstruction. See *Clark*, *supra*, 3 Cal. 4th, at 177, 833 P. 2d, at 640 (Kennard, J., dissenting).[6] Under *Faretta*, the Constitution arguably requires letting a defendant like Clark stand mute, which, as Justice Mosk notes, would be a travesty in a capital case.

Faretta's attractive nuisance must be kept out of the appeal. Appellate defendants will attempt to manipulate the system by asking to represent themselves at the last minute, or changing their minds throughout the course of the appeal. Clark himself tried to continue his manipulative ways during the appeal. See *id.*, at 97, n. 5, 833 P. 2d, at 586, n. 5. Although the California Supreme Court rebuffed Clark, other courts may have less fortitude, other defendants may be more subtle, and the creation of a constitutional rule on this point would create yet another ground for attacking state judgments on federal habeas.

Trial courts indulge defendants like Clark because *Faretta* standards for regulating self-representation are so vague, limited to terminating the right for deliberately obstructive and serious misconduct. *Faretta*, *supra*, 422 U. S., at 834-835, n. 46. *Faretta* does not define the proper timing of the motion, whether a withdrawal is conclusive, or how a defendant may waive his *Faretta* rights. See *id.*, at 852 (Blackmun, J., dissenting). Since *Faretta* error is "not amenable to 'harmless error' analysis," *McCaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984), any court confronted with a *Faretta* motion must walk on eggs.

The problems with *Faretta* on appeal would be particularly severe in capital cases. Although "*Faretta* error" on appeal would not free a defendant, it would delay the execution of the

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6. There is also conflict on the timing of the *Faretta* motion. The trial court's decision to deny the motion on the day of the trial might be error in the Ninth Circuit. See *Fritz* v. *Spalding*, 682 F. 2d 782, 783-784 (1982).

death sentence for many years. Since delay is a victory for defendants in capital cases, extending *Faretta* to appeal would create a powerful incentive for defendants to manipulate the system.

Extending *Faretta* to appeal also raises the possibility of prisoners participating in oral argument before appellate courts. Although this Court held that prisoners have no right to participate in oral argument in *Price* v. *Johnston*, 334 U. S. 266, 284-285 (1948), extending *Faretta* would endanger this precedent. A wealthy, self-represented defendant who can post bail pending appeal would be able to appear before the court to engage in oral argument, while the indigent defendant who cannot afford bail will not be able to attend, strictly due to poverty. Unequal access to the courts based on wealth is a textbook violation of the *Douglas-Griffin* line of cases. See *Douglas* v. *California*, 372 U. S. 353, 357-358 (1963).

Giving prisoners the right to engage in oral argument would present major practical difficulties. The relatively sedate appellate courts would have to beef up their security to the level of the trial courts in order to deal with these potentially volatile litigants. For example, in *United States* v. *Jennings*, 855 F. Supp. 1427, 1432-1433 (MD Pa. 1994), after the defendant's motion to substitute counsel was denied, he struck his attorney on the side of the head with his fist, and six marshals had to restrain him. The next day, Jennings threatened physical harm to the prosecutor, corrections officers, and former defense counsel, including cutting counsel's throat and "drink[ing] his blood." Extending *Faretta* to appeal would force appellate courts to protect themselves from litigants like Jennings, something they are not used to doing.

Even if the heightened security requirements do not waste too many scarce judicial resources, a right to oral argument would create a powerful incentive for prisoners to represent themselves. The temporary freedom associated with oral argument would induce many prisoners to represent themselves in order to get a small taste of freedom. Although this tempo-

rary freedom is likely to sacrifice any prospect of reversing the conviction, impulse control is typically in short supply in the prison population.

The alternative would be to deny all *pro se* appellants oral argument, but that rule would further impair the integrity of the review process. On top of inadequate briefs to be expected from *pro se* appellants, courts would be denied the clarifications that sometimes come from oral argument.

In an era of perpetually scarce judicial resources, the appellate courts act as a particularly severe bottleneck. There are limits on the size and number of appellate courts that do not exist for their trial counterparts. See N. Komesar, Imperfect Alternatives 144-145 (1994). Therefore, "the main bottleneck [to the capacity of the judiciary] is the appellate court structure." *Id.*, at 144. Extending *Faretta* to appeals would increase the strain on a perpetually over-burdened appellate system. Scarce judicial resources would be wasted on increased security, dealing with obstreperous and manipulative litigants, and reading worthless briefs for the purpose of giving a defendant the right to appellate self-immolation.

The most troublesome areas of criminal procedure are those in which a court or a legislature must navigate a narrow, unmarked, treacherous passage between opposing Scylla-and-Charybdis rights. The "tension" between the Eighth Amendment's twin requirements in capital cases of channelled discretion and individualized sentencing, see *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994), is one example. A state which strives to appropriately channel discretion will surely be attacked for insufficient individualization, and vice versa. *Faretta* is another example. When a defendant of doubtful competency makes a *Faretta* motion, the trial judge must plunge into the fog of mental health and determine whether he has the capacity to waive his right to counsel. On appeal and habeas, the court will surely be accused of violating the Constitution regardless of which way it rules. Compare *Godinez* v. *Moran*, 509 U. S. 389, 393-394 (1993) (Ninth

Circuit granted habeas relief because state court granted *Faretta* motion), with *Moore* v. *Calderon*, 108 F. 3d 261, 265 (CA9 1997) (Ninth Circuit granted habeas relief because state court denied *Faretta* motion). The last thing America's courts need is yet another pair of opposing rights which manipulative defendants can use to create more grounds for reversal. Creation of such a dilemma would require an exceptionally compelling justification, and none exists here.

CONCLUSION

The decision of the California Supreme Court denying a writ of mandate should be affirmed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation